Supreme Court, U.S.
FILED
JUN 13 2002
CLERK

No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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49 pg

QUESTIONS PRESENTED

1. Whether California's three-strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike conviction is for petty theft with a prior theft-related conviction?

2. Whether, in light of this Court's existing jurisprudence concerning the Eighth Amendment and proportionality in noncapital cases, the judgment of the California Court of Appeal, holding Andrade's consecutive twenty-five years to life sentences for convictions on two counts of petty theft with a prior, involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1)?

3. Whether the Ninth Circuit or the Fourth Circuit is correct, concerning the necessity for a habeas court analyzing a claim under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court?

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTION, STATUTES, OR REGULATIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. ANDRADE'S SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT	5
A. Background	5
B. Recent Eighth Amendment Jurisprudence In Non-capital Cases	7
C. Andrade's Sentence Is Not Cruel And Unusual Punishment	10
II. THE STATE COURT'S MERITS DETERMINATION DID NOT INVOLVE AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT	26

TABLE OF CONTENTS (continued)

	Page
III. FEDERAL HABEAS COURTS SHOULD NOT DECIDE WHETHER A STATE COURT DETERMINATION WAS ERRONEOUS BEFORE TURNING TO THE QUESTION OF WHETHER THE STATE COURT DETERMINATION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, THE UNITED STATES SUPREME COURT'S CLEAR PRECEDENT	34
CONCLUSION	36

TABLE OF AUTHORITIES

Page

Cases

Andrade v. Attorney General of the State of California
270 F.3d 743 (2001) 1, 7, 12, 13, 18, 23, 26, 30, 32

Bell v. Beck
___ U.S. ___
122 S. Ct. 74
151 L. Ed. 2d 39 (2001) 28

Bell v. Cone
___U.S.___
2002 WL 1050365 26, 27, 29

Bell v. Jarvis
236 F.3d 149 (4th Cir. 2000)
cert. denied sub. nom

Bell v. Beck
___ U.S. ___
122 S. Ct. 74
151 L. Ed. 2d 39 (2001) 28, 34, 35

Butler v. McKellar
494 U.S. 407
110 S. Ct. 1212
108 L. Ed. 2d 307 (1990) 27

Coleman v. Thompson
501 U.S. 722 (1991) 31

TABLE OF AUTHORITIES (continued)

Page

Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California
508 U.S. 602
113 S. Ct. 2264
124 L. Ed. 2d 539 (1993) 29

Cruz v. Miller
255 F.3d 77 (2d Cir. 2001) 30

Francis v. Stone
221 F.3d 100 (2d Cir. 2000) 28, 35

Gore v. United States
357 U.S. 386
78 S. Ct. 1280
2 L. Ed. 2d 1405 (1958) 18

Harmelin v. Michigan
501 U.S. 957
111 S. Ct. 2680
115 L. Ed. 2d 836 (1991) 3, 7, 9-11, 13, 16, 17, 19, 22, 23, 25, 31, 32

Hawkins v. Hargett
200 F.3d 1279 (10th Cir.1999)
cert. denied 531 U.S. 830
121 S. Ct. 83
148 L.Ed2d 45 (U.S. 10/2/2000) 11

Hennon v. Cooper
109 F.3d 330 (7th Cir. 1997) 31

TABLE OF AUTHORITIES (continued)

	Page
Henry v. Page 223 F.3d 477 (7th Cir. 2000)	11
Hernandez v. Small 282 F.3d 1132 (9th Cir. 2002)	30
Hutto v. Davis 454 U.S. 370 102 S. Ct. 703 70 L. Ed. 2d 556 (1982)	7, 31
In re Cervera 24 Cal.4th 1073 103 Cal. Rptr.2d 762 16 P.3d 176 citing Stats. 1994 ch. 12, § 1, pp. 71-75	5, 6
In re Visciotti 14 Cal.4th 325	30
Kansas v. Crane 122 S. Ct. 867 (2002)	15
People v. Mantanez __Cal.App.4th__ 2002 Daily Journal D.A.R. 5120	18, 22, 24
Neal v. Puckett 239 F.3d 683 (5th Cir. 2001)	30

TABLE OF AUTHORITIES (continued)

	Page
O'Dell v. Netherland 521 U.S. 151 117 S. Ct. 1969 138 L. Ed. 2d 351(1997)	30
Penry v. Johnson 532 U.S. 782 121 S. Ct. 1910 150 L. Ed. 2d 9 (2001)	35, 36
People v. Cooper 43 Cal.App.4th 815 51 Cal. Rptr.2d 106 (1996)	16
People v. Garcia 20 Cal.4th 490 85 Cal. Rptr.2d 280 (1999)	6, 16
People v. Gauze 15 Cal.3d 709 125 Cal. Rptr. 773 (1975)	15
People v. Superior Court (Romero) 13 Cal.4th 497 53 Cal. Rptr. 789 (1996)	6, 16, 24
People v. Terry 47 Cal.App.4th 329 54 Cal. Rptr.2d 769 (1996)	6
Riggs v. California 525 U.S. 1114 (1999)	13, 14

TABLE OF AUTHORITIES (continued)

	Page
Rummel v. Estelle 445 U.S. 263 100 S. Ct. 1133 63 L. Ed. 2d 382 (1980)	7-17, 20, 22, 31, 32
Sawyer v. Smith 497 U.S. 227 110 S. Ct. 2822 111 L. Ed. 2d 193 (1990)	27
Sellan v. Kuhlman 261 F.3d 303 (2d Cir. 2001)	30
Smallwood v. Johnson 73 F.3d 1343 (5th Cir. 1996)	11
Solem v. Helm 463 U.S. 277 103 S. CT. 3001 77 L. Ed. 2d 637 (1983)	7-9, 11, 13-20, 22, 24, 30-32
Spencer v. State of Texas 385 U.S. 554 87 S. Ct. 648 17 L. Ed. 2d 606 (1967)	15, 24
Teague v. Lane 389 U.S. 288 109 S. Ct. 1060 103 L. Ed. 2d 334 (1989)	25, 27, 29

TABLE OF AUTHORITIES (continued)

	Page
United States v. Bland 961 F.2d 123 (9th Cir. 1992)	11
United States v. Cardoza 129 F.3d 6 (1st Cir. 1997)	11
United States v. Harris 154 F.3d 1082 (9th Cir. 1998)	9
United States v. Jones 213 F.3d 1253 (10th Cir. 2000)	9
United States v. Kratas 45 F.3d 63 (4th Cir. 1995)	32
United States v. Kratsas 45 F.3d 63 (4th Cir. 1995)	11
Van Tran v. Lindsey 212 F.3d 1143 (9th Cir. 2000) cert. denied 531 U.S. 944 121 S. Ct. 340 148 L. Ed. 2d 274 (2000)	26-29, 34, 35
Visciotti v. Woodford 283 F.3d 1097 (9th Cir. 2002)	30
Walton v. Arizona 497 U.S. 639 (1990)	31, 36

TABLE OF AUTHORITIES (continued)

	Page
Weeks v. Angelone 528 U.S. 225 120 S. Ct. 727 145 L. Ed. 2d 727 (2000)	34, 35
Williams v. Taylor 529 U.S. 362 120 S. Ct. 1495 146 L. Ed. 2d 389 (2000)	26-29, 34
Witte v. United States 515 U.S. 389 115 S. Ct. 2199 132 L. Ed. 2d 351 (1995)	13

Constitutional Provisions

United States Constitution Eighth Amendment	6-12, 14-16, 21, 24, 26, 31, 32, 36

Statutes

28 United States Code	
§ 1254(1)	2
§ 2254	3, 26
§ 2254(d)	33, 36
§ 2254(d)(1)	26-28, 34

TABLE OF AUTHORITIES (continued)

	Page
California Penal Code	
§ 484	6
§ 484(a)	3
§ 486	3
§ 487(a)	13
§ 488	6
§ 666	3, 6
§ 667(a)	21
§ 667(b) through (i)	3, 5
§ 667(c)	16
§ 667(c)(6)	6
§ 667(e)(2)(A)	5
§ 667(e)(2)(A)(ii)	6
§ 667.5(c)	5
§ 1170.12	5
§ 1192.7(c)	5
§ 1192.7(c)(18)	5
§ 12022.53	21

Other Authorities

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")	2, 26, 29, 30, 34
Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. No. 104-132, 110 Stat. 1214	26
California's "Three-Strikes" Debacle 25 Sw. U. L. Rev. at 135	16

TABLE OF AUTHORITIES (continued)

	Page
Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002	23
Owens, *California's "Three Strikes" Debacle: A Volatile Mixture Of Fear, Vengeance, And Demagoguery Will Unravel The Criminal Justice System And Bring California To Its Knees* (1995) 25 Sw. U. L. Rev. 129, 132-36	16

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OPINION OR JUDGMENT BELOW

A copy of the unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division Two, appears as Appendix E to the petition for writ of certiorari at pages 68-80.

A copy of the unpublished order of the California Supreme Court, denying respondent's petition for review on direct appeal, appears as Appendix F to the petition for writ of certiorari at page 81.

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the United States District Court for the Central District of California, Western Division, is reported in *Andrade v. Attorney General of the State of California*, 270 F.3d 743 (2001). A copy of the opinion appears as Appendix A to the petition for writ of certiorari at pages 2-53.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals. The opinion of the United States Court of Appeals for the Ninth Circuit was filed on November 2, 2001. The petition for writ of certiorari was granted April 1, 2002.

CONSTITUTION, STATUTES, OR REGULATIONS

United States Constitution, VIII Amendment.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. § 2254 et seq

STATEMENT OF THE CASE

On November 4, 1995, Andrade and a female entered a K-Mart store in Ontario, California, and proceeded to the electronics department. Andrade looked around, selected some videotapes and stuffed them inside his trousers. Andrade looked around again, grabbed some more tapes, and stuffed them inside his trousers. After exiting the store without paying for the merchandise, Andrade was stopped and detained by store security personnel. The combined value of the videotapes was $84.70. Pet. for Cert App. at 11.

Two weeks later, on November 18, 1995, Andrade and two females entered a K-Mart store in Montclair, California, and proceeded to the electronics department. Andrade selected a videotape and put it down the waist of his pants. Andrade selected two more tapes and went behind a partition. After exiting the store without paying for the merchandise, Andrade was stopped and detained by store

security personnel. The combined value of the videotapes was $68.84. Pet. for Cert. App. at 11.

Following a jury trial, Andrade was convicted of two counts of petty theft with a prior conviction (Cal. Pen. Code §§ 484(a), 486, 666), and the jury found true additional allegations that Andrade had sustained three prior serious or violent felony convictions within the meaning of California's three-strikes law (Cal. Pen. Code § 667(b) through (i)).[1] Joint App. at 16-20. Thereafter, the Superior Court of the State of California in and for the County of San Bernardino sentenced Andrade to two consecutive indeterminate terms of twenty-five years to life in state prison. Joint App. at 65-69.

Subsequently, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment, finding the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. App. to Cert. at 68, 76-79. The California Supreme Court denied further review. App. to Cert. at 81.

Based on an application made pursuant to 28 U.S.C. § 2254, the United States District Court for the Central District of California denied relief, finding the California Court of Appeal's determination of the Eighth Amendment claim was neither contrary to, nor did it involve an unreasonable application of, clearly established Supreme Court precedent. App. to Cert. at 54-64. The United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the matter with instructions. App. to Cert. at 43-44.

SUMMARY OF ARGUMENT

In *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), this Court held the Eighth

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1. Unless otherwise indicated, all further statutory references will be to California codes.

Amendment contains a narrow proportionality principle, and articulated four guiding principles for determining the uses and limitations of proportionality review. Application of those principles to the instant matter reveals the sentence under review here is not one of the exceedingly rare examples of cruel and unusual punishment proscribed by the Eighth Amendment.

Moreover, Congress enacted a habeas corpus reform act which precludes federal courts from granting relief to persons in custody pursuant to a state court judgment on any claim adjudicated on the merits in state court proceedings unless, in relevant part, the state court adjudication resulted in a decision that involved an unreasonable application of clearly established federal law as determined by this Court. The state court determination here did not unreasonably apply this Court's clearly established precedent, because the law concerning proportionality review of non-capital cases is unclear.

Finally, federal courts should be limited to reviewing the decision, as opposed to the reasoning, of the state court. Moreover, a clear error standard should not be the basis for determining the reasonableness of a state court's determination.

ARGUMENT

I.

ANDRADE'S SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT

A. Background

In 1994, California enacted a pair of substantively identical statutes creating California's Three-Strikes law (three-strikes). One, California Penal Code § 667(b) through (i), was enacted by the legislature. *In re Cervera* 24 Cal.4th 1073, 1075, 103 Cal. Rptr.2d 762, 16 P.3d 176, citing Stats. 1994, ch. 12, § 1, pp. 71-75. The other, Penal Code § 1170.12, was enacted by ballot initiative. *Cervera*, 24 Cal.4th at 1075, citing Prop. 184, as approved by the voters, Gen. Elec. (Nov. 8, 1994). Notwithstanding any other law or provision of law, three-strikes applies when a defendant is convicted of any felony and has previously been convicted of one or more "strikes." "Strikes" are serious or violent felonies as defined in California Penal Code sections 1192.7(c) and 667.5(c), respectively. The purpose of three-strikes is to impose longer prison terms and greater punishment on persons who commit felonies and have been previously convicted of serious and/or violent felonies. Pen. Code, § 667(b). Residential burglary is one of the enumerated serious felonies. Penal Code, § 1192.7(c)(18).

Penal Code § 667(e)(2)(A) provides that when a defendant is convicted of a triggering felony and has two or more strikes that have been pled and proved, three-strikes mandates an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence as the greater of: (i) three times the term otherwise provided as punishment for each current felony conviction; (ii) 25 years; or (iii) the term for the underlying conviction including any applicable

enhancement. A defendant sentenced to an indeterminate sentence under three-strikes is ineligible for parole until he has served his entire mandatory minimum term. *Cervera*, 24 Cal.4th at 1075. When there is more than one current conviction not committed on the same occasion, and not arising from the same set of operative facts, three-strikes mandates consecutive sentences. Pen. Code, § 667(c)(6). Sentencing courts have discretion to dismiss the strikes in the interest of justice in their entirety (*People v. Superior Court (Romero)*, 13 Cal.4th 497, 53 Cal. Rptr. 789 (1996)), or on a count by count basis. *People v. Garcia*, 20 Cal.4th 490, 85 Cal. Rptr.2d 280 (1999).

Although a recidivist's criminal record must include strikes in order to come within the scope of three-strikes, the triggering offense may be any felony under California law, including so-called "wobblers." A wobbler is an offense that can be either a misdemeanor or a felony, depending on whether it is punished by imprisonment in either the county jail or in state prison. "In the case of wobblers, the characterization of the crime is dependent upon the actual punishment imposed." *People v. Terry*, 47 Cal.App.4th 329, 332; 54 Cal. Rptr.2d 769 (1996). Petty theft with a prior theft-related conviction and imprisonment or custody on that prior (petty theft with a prior), is a wobbler. Pen. Code, §§ 484/488/666. In March of 1996, Andrade was convicted in state court of two counts of petty theft with a prior and a jury found true allegations that he had previously been convicted of three residential burglaries. In April of 1996, pursuant to Penal Code §§ 667(c)(6) and 667(e)(2)(A)(ii), the Superior Court of the State of California for the County of San Bernardino sentenced Andrade to two 25-years-to-life terms, to be served consecutively. The California Court of Appeal affirmed Andrade's sentence, rejecting his claim that the sentence was cruel and unusual punishment as proscribed by the Eighth Amendment. The California Supreme Court summarily denied Andrade's petition for review of the court of appeal's opinion.

The United States District Court for the Central District of California denied Andrade's petition for writ of habeas corpus which claimed, inter alia, his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment, finding the state court's conclusions reasonable applications of federal law. Relying on *Solem v. Helm*, 463 U.S. 277, 103 S. CT. 3001, 77 L. Ed. 2d 637 (1983) and *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), the United States Court of Appeals for the Ninth Circuit reversed the district court's decision, holding California's three-strikes law as applied in this case was unconstitutional because the sentence imposed was grossly disproportionate to Andrade's crimes, and the state court merits determination constituted an unreasonable application of clearly established Supreme Court law. *Andrade v. Attorney General of the State of California*, 270 F.3d 743, 766-767.

B. Recent Eighth Amendment Jurisprudence In Non-capital Cases

In *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), this Court questioned whether the Eighth Amendment includes a proportionality guarantee in non-capital cases. This Court distinguished between punishments which by their nature differ from other forms of accepted punishment, and "punishments which differ from others only in duration." *Hutto v. Davis*, 454 U.S. 370, 373, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982), citing *Rummel*, 445 U.S. at 275. This Court said its Eighth Amendment judgments should neither be nor appear to be merely the subjective opinions of individual justices, and the "excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make `any constitutional distinction between one term of years and a shorter or longer term of years'" *Hutto*, 454 U.S. at 373, quoting *Rummel*, 445 U.S. at 275. This Court

concluded that it could be argued without fear of contradiction by any decision of this Court that, for felonies, the length of the sentence was purely a matter of legislative prerogative. Thus, this Court upheld a life sentence for a defendant who obtained $120.75 by false pretenses, and whose only prior convictions were for fraudulent use of a credit card to obtain $80.00 worth of goods and passing a forged check in the amount of $28.36. *Rummel*, 445 U.S. at 271-72, 274. Noting that outside the context of capital punishment successful challenges to the proportionality of a sentence have been exceedingly rare, this Court further explained that the state has a legitimate interest in "dealing with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Id.* at 271-72, 285. This Court said the strength of this interest is not necessarily affected by the presence or absence of violence during the commission of the offense, and a state is therefore entitled to separate a recidivist offender from society for a longer period of time than a first-time offender. *Id.* at 275, 284-285.

In *Solem*, the defendant had been sentenced pursuant to a state recidivist statute to life imprisonment without the possibility of parole for writing a no-account check for $100. *Solem*, 463 U.S. at 281-82. The defendant had previously sustained six nonviolent convictions, "none [of which] was a crime against a person". *Id.* at 279-80. Those convictions included third-degree burglary, grand larceny, obtaining money under false pretenses, and driving while intoxicated. *Id.*. In a five-to-four opinion, this Court employed a three-prong "proportionality analysis" to determine whether the length of imprisonment constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 292. The first prong considered the gravity of the offense relative to the harshness of the penalty, which included a consideration of any prior convictions supporting the sentence under a recidivist sentencing scheme. The second prong considered the sentences imposed on other criminals in the same jurisdiction for different

offenses. The third prong considered the sentences imposed on criminals in other jurisdictions for the same offense. *Id.* at 292-94, 296-97. Applying this analysis, this Court concluded the defendant's sentence violated the Eighth Amendment. *Id.* at 303. Significantly, while *Solem* embraced a different analysis than that applied in *Rummel*, the *Solem* court twice cited *Rummel* with approval and noted that *Rummel* is controlling in a similar factual situation. *Solem*, 463 U.S. at 296-97, 304, fn.32. Moreover, the four dissenting justices vigorously disputed the proposition that noncapital cases are subject to a proportionality guarantee, and criticized the majority for ignoring or distorting the holding in *Rummel*, decided only three years earlier. *Id.* at 304-15.

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), this Court found itself irreconcilably split on the question of whether the Eighth Amendment includes a proportionality guarantee in noncapital cases. Nevertheless, this Court upheld a life sentence without the possibility of parole for possession of more than 650 grams of cocaine. In a separate opinion, two justices held there was no proportionality guarantee in non-capital cases. *Harmelin*, 501 U.S. at 965. In a concurring opinion, Justice Kennedy, joined by Justices O'Connor and Souter, harmonized this Court's holdings in *Rummel* and *Solem*, and articulated a revised test. This revised test held the Eighth Amendment does not require strict proportionality between crime and sentence, and forbids only "extreme sentences which are 'grossly disproportionate' to the crime." *Id.* at 1001 (Kennedy, J., concurring). Justice Kennedy's test is regarded as "the rule of Harmelin." *United States v. Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998).

The concurring opinion warned that successful challenges to the specific length of a sentence are "exceedingly rare" because of the "relative lack of objective standards concerning terms of imprisonment." *Harmelin*, 501 U.S. at 1001 (Kennedy, J. concurring). Finding the Eighth Amendment

includes a "narrow proportionality principle," Justice Kennedy's opinion acknowledged that the principle's "precise contours are unclear." *Id.* at 998. Despite the lack of precision, the plurality opinion identified four principles for determining the "uses and limits of proportionality review." *Id.* at 998. The first principle is that the fixing of prison terms for specific crimes is generally a legislative, rather than judicial, matter and reviewing courts should therefore grant substantial deference to that authority. *Harmelin*, 501 U.S. at 998-99. The second principle provides that the Eighth Amendment does not mandate any particular penological theory and, therefore, state legislatures have plenary power to grant "different weights at different times to the penological goals of retribution, deterrence, incapacitation and rehabilitation." *Id.* at 999. The third principle is that the very nature of the federal structure means there will inevitably be marked differences in the theory of sentencing and the lengths of sentences. Thus, the states have independent power to articulate societal norms through the criminal law; and the fact that one state has more severe punishment for a particular crime does not, by itself, render the punishment grossly disproportionate. *Id.* at 1000. The fourth principle is that proportionality review should be informed by "objective factors to the maximum extent possible." *Id., quoting Rummel*, 455 U.S. at 274-75.

C. Andrade's Sentence Is Not Cruel And Unusual Punishment

Applying this Court's relevant Eighth Amendment jurisprudence, it cannot be reasonably concluded that Andrade's sentence violates the Eighth Amendment. When the guiding principles of proportionality review, as articulated in *Harmelin*, are properly applied it is clear that in light of Andrade's recidivist status, having previously been convicted of three serious felonies, an aggregate indeterminate sentence of fifty

years to life in state prison is not one of the "exceedingly rare" terms of imprisonment prohibited as cruel and unusual punishment by the Eighth Amendment. *Harmelin*, 501 U.S. at 1001, quoting *Solem*, 463 U.S. at 289-290.

In *Solem*, this Court compared the gravity of offense and harshness of penalty, and then performed a comparative analysis between the defendant's sentence and sentences imposed for other crimes in Michigan, and sentences imposed for the same crime in other jurisdictions. In *Harmelin*, the plurality opinion explained that *Solem* did not establish a rigid three-part test and is best understood as having held comparative analysis within and between jurisdictions is not always relevant to proportionality review. "[I]ntrajurisidictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1004-1005 (Kennedy, J., concurring). "The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime." *Ibid.*

The plurality's method of analysis has been adopted by most lower federal courts, including the Ninth Circuit. *See, U.S. v. Cardoza*, 129 F.3d 6, 18 (1st Cir. 1997); *Smallwood v. Johnson*, 73 F.3d 1343, 1347 (5th Cir. 1996); *U.S. v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992); *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir.1999), cert. denied 531 U.S. 830, 121 S. Ct. 83, 148 L.Ed2d 45 (U.S. 10/2/2000). Nevertheless, the Fourth Circuit and Seventh Circuit continue to follow the full *Solem* test, on the theory that a majority of the *Harmelin* court either declined to overrule *Solem* or explicitly approved of *Solem*. *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995); *Henry v. Page*, 223 F.3d 477, 481-482 (7th Cir. 2000).

The concept of gross proportionality is not clearly defined, however. For example, the defendant in *Rummel* attempted to show that only the state of Texas would impose a life term for a third offense of theft. This Court rejected such a

comparison, noting that a number of States imposed a mandatory life sentence upon conviction of four felonies rather than three; other States required one or more of the felonies to be "violent" to support a life sentence; and still other States left the imposition of a life sentence after three felonies within the discretion of a judge or jury. Thus, this Court noted, it was "one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. [citation]. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix." *Rummel*, 445 U.S. at 280. Also noteworthy was this Court's recognition that Texas held out the possibility of parole, however slim. *See, id.*, at 281. The same is true in California.

In the present case, a threshold comparison of the gravity of Andrade's offense to the harshness of the penalty does not lead to an inference of gross disproportionality under any reasonable meaning of the term. Although Andrade's offenses were, in the abstract, relatively non-serious when compared with crimes such as murder and rape, realistically they were far more serious than the characterization the court below gave them. Minimizing the severity of the offenses by relying on the absence of violence, or by persistently referring to them as petty theft, or by relying on the small value of the property taken, and by calling the core offenses misdemeanor rather than felonies (*Andrade*, 279 F.3d at 759-61), while giving precious little regard to the recidivism involved, provides no useful comparison when evaluating the severity of the offenses.[2]

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2. This Court's Eighth Amendment jurisprudence provides that deference is owed to a state legislature's determination fixing prison terms for specific crimes. *Harmelin*, 501 U.S. at 998-999. Respondent can find nothing in this Court's jurisprudence which justifies a lesser deference

As this Court has observed, "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel*, 445 U.S. at 275. Moreover, any suggestion that the conduct is misdemeanor in nature fails to follow the revised *Solem* test as articulated in *Harmelin*, and misses the point. Focusing on how a recidivist's crimes would have been viewed had they been first offenses is disingenuous. In California, Andrade's crimes were not misdemeanors. The People of the State of California, by their duly elected representatives, have determined that the theft of property of any value is classifiable as a felony if the defendant had a prior theft-related offense and was placed in custody as a result of that offense. That determination is no different than the legislature's determination that the theft of property exceeding a value of $400 is a felony. California Penal Code § 487(a). Both involve line drawing that reflects the legislature's conclusions regarding society's interests. And, as *Harmelin* implicitly recognized, the California Legislature has plenary authority to make that determination.

Nor was there any unconstitutional dual use of prior convictions here. This Court has never suggested that an alleged dual use of a prior conviction implicates the Constitution. If anything, this Court has suggested the opposite. In *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995), for example, this Court held that, in sentencing the defendant for attempted possession of marijuana with intent to distribute, a sentencing court's consideration of an uncharged plan to ship cocaine did not constitute punishment, therefore did not violate the prohibition against multiple

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because the crime involved was a wobbler, as the Ninth Circuit seems to suggest. *Andrade*, 279 F.3d at 760, citing *Riggs v. California* 525 U.S. 1114 (1999) (respecting the denial of a petition for writ of certiorari).

punishments, and was a potential unfairness that the guidelines take into account. *Id.*, at 406. Here, similarly, any unfairness arising from the alleged dual use does not implicate the Constitution, and can be addressed via the sentencing court's discretion to dismiss strikes. In addition, in California, petty theft with a prior has been classifiable as a felony since the offense was first enacted, in 1872, and thus was in effect when three-strikes was enacted. Therefore, California's procedure is not tantamount to dual use; it merely establishes a more severe sentencing scheme for the triggering offense. Also, and dispositively in this case, the prior theft-related conviction alleged here was not one of the prior strikes, it was a March 7, 1990, petty theft conviction. Joint Appendix at 3-15.

Andrade twice stole property having previously been convicted of theft-related crimes. Accordingly, in California, he did not commit "core conduct" classified in the first instance as a misdemeanor, i.e., simple misdemeanor petty thefts. Rather, he committed offenses which were properly classifiable as felonies, a matter within the discretion of the prosecutor. And defining an act as criminal is pre-eminently the province of the legislature, and a state is entitled to make its own judgment as to where the line between a misdemeanor and a felony lies. See, *Rummel*, 445 U.S. at 275, 284.

More importantly, Andrade's recidivism demonstrates his triggering offenses are far more serious than recognized. Although the weight to be assigned to prior convictions in evaluating the constitutionality of a recidivist sentence is unclear, this Court's Eighth Amendment jurisprudence recognizes that prior convictions are relevant to a sentencing decision. *Compare, Solem*, 463 U.S. at 296, n. 21, *with Riggs*, 525 U.S. at 1114 (opinion denying writ of certiorari). Therefore, regardless of how much weight to assign Andrade's prior offenses, they cannot be divorced from his triggering offenses. It is precisely that recidivism which created the particular circumstances Andrade finds himself in today. In other words, it is not so much the triggering offenses themselves

that establish the seriousness of the offenses, it is Andrade's demonstrable refusal to remain law-abiding, despite the fact that he has been "graphically informed of the consequences of lawlessness and given an opportunity to reform. . ." *Rummel*, 445 U.S. at 278. Recidivists choose to reoffend, and therefore are amenable to deterrence through the criminal law. *Kansas v. Crane*, 122 S. Ct. 867, 874 (2002). Thus, the jurisprudence of this Court has held it is proper to punish a recidivist more severely than first-time offenders. *See, Spencer v. State of Texas*, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

Nor does the absence of violence in the prior offenses mean the instant offenses were so lacking in gravity that they are inferentially disproportionate to Andrade's punishment. As previously discussed, the absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel*, 445 U.S. at 275. Besides, although nothing in the record indicates Andrade engaged in violence when he committed a series of residential burglaries, the potential for violence was great. *People v. Gauze*, 15 Cal.3d 709, 715, 125 Cal. Rptr. 773 (1975) (burglary laws principally based on recognition of danger to personal safety created by the usual burglary scenario); *see, Solem*, 463 U.S. at 304 (Burger, C.J., dissenting) (characterizing burglaries as innocuous constitutes a fiction); *id.*, at 315-16 (burglary poses a real risk of serious harm to others).

In addition, neither the lack of discretion to impose concurrent rather than consecutive terms, or the lack of good conduct or work credits, rendered the sentence substantially more severe than the life sentence involved in *Rummel*.[3] The Eighth Amendment does not mandate any one penological

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3. Contrary to the Ninth Circuit's characterization, Andrade was not sentenced to a single 50-years to life term; he was sentenced to two 25-years to life terms to be served consecutively.

theory. The states "have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring); Owens, *California's "Three Strikes" Debacle: A Volatile Mixture Of Fear, Vengeance, And Demagoguery Will Unravel The Criminal Justice System And Bring California To Its Knees* (1995) 25 Sw. U. L. Rev. 129, 132-36 (discussion on the evolution from compensatory sentencing and retribution, to reformation, to counter-reformation). Here, in enacting the three-strikes law, California has expressly accorded maximum weight to the goals of retribution, deterrence, and the incapacitation of certain repeat offenders. Pen. Code, § 667(c); *People v. Cooper*, 43 Cal.App.4th 815, 824, 51 Cal. Rptr.2d 106 (1996).

Moreover, in order to distinguish *Rummel*, *Solem* relied on the fact that South Dakota had abandoned rehabilitation as a penological goal whereas Texas had not. But the fact that California has de-emphasized rehabilitation for the time-being is of minimal import. Even scholarly reviews critical of three-strikes acknowledge rehabilitation as an indeterminate sentencing goal has failed. *See, California's "Three-Strikes" Debacle*, 25 Sw. U. L. Rev. at 135. Thus, any suggestion that a state must retain the prospect of rehabilitation as a penological goal or else risk being deemed to have violated the Eighth Amendment constitutes a substitution of the judiciary's judgment for the legislature's.

Further, three-strikes does not abandon rehabilitation completely. The law provides for parole after a minimum term is served and, as previously discussed, the California Supreme Court has construed the law as establishing a safety valve so that strikes can be dismissed in the interests of justice. *People v. Superior Court (Romero)*, 13 Cal.4th 497; *People v. Garcia*, 20 Cal.4th 490.

In any event, over time the attitude of the citizens of California may well change. In the meantime, however, deference should be at its apex, and "'[n]o neutral principle of

adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed.'" *Solem*, 463 U.S. at 314, quoting *Rummel*, 445 U.S.263 (Burger, C.J., dissenting).

The primacy of the legislature in fixing prison terms for crimes must be given substantial deference. The People of the State of California, by their duly elected Legislature and by ballot initiative, have determined that a person who commits a serious or violent felony on two or more occasions and who subsequently commits another felony offense, albeit not a serious or violent one, poses a significant danger to society such that he or she must be imprisoned for no less than twenty-five years to life. Such a determination clearly comports with the second *Harmelin* principle.

Moreover, California's approach is rational. According to Bill Jones, California's Secretary of State who, as a member of the State Assembly authored the three-strikes law, a large percentage of crime is committed by a relatively small number of repeat offenders; six percent of the criminal population commits sixty to seventy percent of all crime. Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002, at B7. Recidivist statutes are intended to deter repeat offenders and, at some point in the life of a person who repeatedly commits felonies, "segregate that person from society for an extended period of time." *Rummel*, 445 U.S. at 284. And, ". . .the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Id.*, at 285.

The virtue of vesting the legislative branch with this authority -- except in the most extreme cases such as the oft-mentioned, and virtually certain never to occur, hypothetical of a life sentence for a parking violation -- is clear. Our society is deeply conflicted on many issues, including the relationship between law and the social order. *See, Harmelin*, 501 U.S. at

998 (Kennedy, J., concurring). Resolving those conflicts is peculiarly a question of legislative policy. *Id.*, at 999, citing *Gore v. United States*, 357 U.S. 386, 393, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958). The judiciary's incursion into such conflicts, except in the most extreme cases about which there can be no debate, inevitably leads, as it did here, to the "substitution of individual subjective moral values for those of the legislature." *Solem*, 463 U.S. at 314 (Burger, C.J., dissenting); *see also, People v. Mantanez*, __Cal.App.4th__, 2002 Daily Journal D.A.R. 5120 (*Andrade* Court's subjective determination that life term for petty theft with a prior disproportionate overlooked the limitation on a court's role in the criminal process). In other words, except in non-debatable cases, the reviewing court's subjective opinion as to what is appropriate, on an abstract moral scale, replaces the subjective views of society as expressed through the public debate inherent in the legislative process.[4/] And, it is a "curious business" for a

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4. In fact, the legislative process did respond to concerns regarding the three-strikes issue under consideration in this case. In the wake of the notoriety surrounding this case and a few others, two bills were introduced in the California Legislature, attempting to amend three-strikes. One, AB 1790, sought to remove the mandatory minimum sentencing requirements if the triggering offense is a non-violent felony. The other, SB 1517, sought to exempt some "non-serious" felonies from three-strikes. AB 1790 is currently being held under submission in the Assembly Appropriations Committee. On May 29, 2002, the California Senate rejected SB 1517. In voting against the bill, Senator Ray Haynes, a Republican from Riverside, said an individual convicted of two violent felonies should not commit a third felony, violent or not. "If you commit a third felony, you are completely uninformed . . . and you are demonstrating to the rest of society that you don't want to live among us." "Three strikes revision rejected," *The*

court to "so far intrude into the administration of criminal justice to say that a state legislature is barred by the Constitution from identifying its habitual criminals and removing them from the street." *Solem*, 463 U.S. at 317 (Burger, C.J., dissenting).

The fourth *Harmelin* principle, that any harshness of penalty analysis must be informed by objective factors to the maximum extent possible, also indicates there is no inference of disproportionality here. Contrary to the Ninth Circuit's approach, the fact that Andrade was thirty-seven years old at the time of his sentencing and the life expectancy of a thirty-seven-year-old American male is seventy-seven years, provides no objective basis for analysis. Such reasoning manifests the very problem this Court tried to address by mandating the use of objective factors in the first place, i.e., it results in an unworkable system. For example, would the sentence imposed on Andrade be constitutional if he had been twenty years old at the time of sentencing? Would it be constitutional if it resulted in two consecutive twenty-year sentences with parole eligibility after a minimum of forty years, i.e., when Andrade was still within his life expectancy? What if the National Center for Health Statistics revises its estimate of the life expectancy of a 37-year-old American male? Surely, the various health profiles of defendants will affect their life expectancies. Therefore, to what extent is a defendant's individual health status at the time of sentencing a factor in the constitutionality of a sentence?

Moreover, Andrade's sentence is a "term of years," which is markedly different than the "life without parole" sentences considered in *Solem* and *Harmelin*. And even though Andrade will not be eligible for parole for 50 years, his sentence is not the functional equivalent of life without parole. His sentence still offers the possibility of parole, albeit minimal. Besides, Andrade's ineligibility for parole for 50 years is a function of three-strikes' mandate for consecutive sentencing,

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Sacramento Bee, May 30, 2002.

not the fundamental question of whether a 25-years-to-life sentence is disproportionate for each of Andrade's recidivist acts.

More importantly, as this Court has previously recognized, proportionality review of the harshness of a penalty is virtually impossible for a "term of years" sentence, because there are no objective standards for distinguishing between sentences of different lengths. *See, Solem*, 463 U.S. at 306 (Burger, C.J., dissenting) (in the absence of objective standards, reviewing courts are asked to "determine on an abstract moral scale" if the defendant has received his just desserts for his crimes). In fact, what happened here, i.e., a reliance on purely subjective factors, illustrates the problem. And given the infinite permutations of subjective factors, unless a sentence was beyond debate among reasonable minds, endorsing proportionality review for terms of years sentences would virtually require particularized sentencing for every defendant; something this Court has never required in non-capital cases. As Chief Justice Burger's dissent in *Solem* suggested, it is a question of whether a bright line can be drawn or not. A bright line can be drawn between death and various other punishments short of that sanction. Similarly, *Solem* could draw a bright line between life without the possibility of parole and the term of years in *Rummel*. No bright line can be drawn between various terms of years, however.

Even assuming a threshold comparison of the gravity of the offense and the harshness of penalty led to an inference of gross disproportionality here, intrajurisdictional and interjurisdictional comparisons would not validate the initial conclusion. On an intrajurisdictional basis, the finding that Andrade's fifty years-to-life sentence was exceeded in California only by sentences imposed for first-degree murder and a few other violent crimes, and longer than sentences imposed for certain other third-strike offenders, is flawed and incomplete. Andrade's two consecutive twenty-five year sentences cannot be fairly compared to other three-strike

defendants who committed only one offense. Andrade's sentence is twice as long as other three-strikes defendants because he committed twice as many offenses. Moreover, it is wrong to compare stacked offenses as a single punishment, because it enables defendants to generate a colorable Eighth Amendment claim simply by reoffending. *See, Andrade*, 270 F.3d at 772 n. 4 (Sneed, J. dissenting).

A recidivist's sentence cannot be compared with the sentences non-recidivist first-time offenders receive, either. California has enacted a recidivist sentencing statute carefully tailored to address those defendants that pose the greatest danger and create the most significant burden to society. Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002, at B7. It is the significant burden Andrade places on society by virtue of his chronic criminal activity that is under consideration. Therefore, a more appropriate comparison would be between Andrade's sentence and the sentences received by more serious recidivists in California; a comparison that favors the state. Sentences meted out under the three-strikes law become significantly longer for progressively more serious offenses.

For example, pursuant to Penal Code § 667(a), a recidivist who commits a serious felony will receive, in addition to the basic 25 to life, an additional consecutive five-year enhancement for each serious prior pled and proved. Another example is Penal Code § 12022.53, which provides for an additional ten years if the defendant used a firearm during the commission of the current crime, twenty years if the defendant fired the gun, and 25 years to life if the defendant fired the firearm and caused great bodily injury or death. Thus, a person who committed the most heinous of crimes, i.e., a first-degree murderer, who also had two strikes, would receive, at a minimum, 75 years to life plus additional punishment for prior serious felonies. Accordingly, when a proper comparison is made, it is apparent that defendants with more serious or violent triggering offenses are punished more harshly than Andrade.

The interjurisdictional analysis, which found Andrade's sentence cruel and unusual punishment, is similarly flawed, as it fails to recognize *Harmelin's* third principle, that significant differences in the length of prescribed sentences are the inevitable, and often beneficial, result of our nation's federal structure. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282. The fact that the statute employed against Andrade_is the most stringent in the nation hardly renders Andrade's punishment grossly disproportionate and therefore unconstitutional. *See, Id.* In fact, the irony is, as the California Court of Appeal recently observed, under the Ninth Circuit's rationale federalism would only extend "to those within the extremes," and the extremes would be "automatically suspect." *Mantanez*, __Cal.App.4th__, 2002 Daily Journal D.A.R. 5120.

In addition, at least four other states have recidivist sentencing schemes that , contrary to the opinion below, are not significantly distinguishable, in a Constitutional sense, from California's as it relates to Andrade. *See, Andrade*, 270 F.3d at 762-65. And the fact that four other states' views are close to California's tends to invalidate any inference of gross disproportionality.

The rationale used by the court below also trampled on fundamental concepts of federalism in another way; it ignores the fact that California's situation is simply drastically different than that of the other states. *See, Solem*, 463 U.S. at 309 (Burger, C.J., dissenting). California is entitled to evaluate the relationship between the crime rate and recidivism, and to incapacitate habitual offenders in accordance with its construction of the results, regardless of the views of any other state. Conversely, a rigid obligation to engage in interjurisdictional comparisons allows the sentencing approach of an individual state to be dictated by other states whose views might differ, gradually ratcheting down punishments to a de

facto uniform national sentencing scheme. Thus, a proper respect to a state's independent power to articulate societal norms through its criminal law demands substantial consideration of *Harmelin's* third factor.

Stated another way, the citizens of the State of California are entitled to conclude that a person such as Andrade, who has demonstrated a willingness to commit serious or violent felonies on more than one occasion, who has been imprisoned for that conduct, and who subsequently evidences a continued refusal to remain law-abiding, has manifested an imperviousness to deterrence that poses a significant danger to society, regardless of how trivial the triggering offense may be. In other words, nothing in the Constitution requires society to wait for another person to be victimized by another serious or violent crime before isolating such a defendant for a substantial period of time. See, Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002, at B7.

Finally, the uses and limits of proportionality review, as enumerated in *Harmelin*, require a reviewing court to respect a basis for a sentence if the basis is rational. *Andrade*, 270 F.3d at 769, (Sneed, J., dissenting), citing *Harmelin*, 501 U.S. at 1004. Here, there is a rational basis for Andrade's sentence. California is the most populous state, with the largest problem of crime and recidivism. Since the adoption of three-strikes, California has experienced a forty-one percent drop in its crime rate, whereas the rest of the nation experienced a nineteen percent drop. See, Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002, at B7. In *Harmelin*, the plurality concluded the pernicious effects of the drug epidemic demonstrated the Michigan Legislature could rationally conclude the threat posed by the possession of 1.5 pounds of cocaine was momentous enough to warrant the deterrence and retribution of a life without the possibility of parole sentence. Here, similarly, the California Legislature could rationally conclude that the pernicious effects of a defendant's continued failure to remain law-abiding, combined with a demonstrated

willingness to commit serious felonies, is momentous enough to warrant the deterrence, retribution, and segregation resulting from a life sentence. The fact that Andrade received two life sentences, back to back, is more an indication of his failure to respect the notice he was given, than it is an indication that three-strikes as applied to him violates the Eighth Amendment.

Moreover, unlike the sentencing scheme considered in *Solem*, California's scheme incorporates a discretionary feature, supporting the conclusion that the scheme is constitutional. A putatively disproportionate three-strikes sentence is subject to judicial modification if the sentencing court deems it appropriate. *Mantanez*, __Cal.App.4th__, 2002 Daily Journal D.A.R. 5120, citing *Romero*, 13 Cal.4th 497. "This safety valve suffices for constitutional purposes; no greater and more informed wisdom concerning an offender's culpability is, as a matter of course, available to a reviewing court." *Ibid.*

Although Andrade's sentence is severe, the fact that it does not involve life without the possibility of parole distinguishes it from *Solem*. Moreover, it is not grossly disparate given Andrade's record. Numerous decisions of this Court have held it is proper to punish a recidivist more severely than first-time offenders (see, *Spencer*, 385 U.S. 554), and all that is being considered here is where to draw the line. Andrade's criminal history establishes he is a serious offender. In the seventeen years preceding the instant convictions, he has one misdemeanor theft conviction for which he served six days in jail and received twelve months probation, three residential burglary convictions in state court, two transportation of marijuana convictions in federal court, one petty theft conviction in state court, and seven residential burglary charges were dismissed pursuant to a plea bargain. In addition, he violated federal parole by escaping from custody. Andrade's sentence simply reflects California's substantive penological judgment regarding how long chronic criminals such as Andrade need to be isolated from society. "And the

responsibility for making these fundamental choices and implementing them lies with the legislature." *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring).

In summation, similar to the approach taken in *Teague v. Lane*, 389 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), for determining whether a rule is dictated by precedent, petitioner maintains that "exceedingly rare" instances of unconstitutional sentences ought to be limited to sentences which are not susceptible to debate among reasonable minds. Short of that virtually complete consensus, a determination as to the appropriate punishment for recidivism is best left to the legislature. Andrade's sentence is subject to debate among reasonable minds. Moreover, given the burden a felony recidivist places on society, a life sentence is categorically not grossly disproportionate. Therefore, Andrade's sentence is constitutional.

II.

THE STATE COURT'S MERITS DETERMINATION DID NOT INVOLVE AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT

In the course of resolving Andrade's direct appeal, the California Court of Appeal held Andrade's sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Pet. for Cert. App. at 76-79. In 1998, long after enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (AEDPA), Andrade filed an application pursuant to 28 U.S.C. § 2254. The district court denied the application finding the state-court decision was neither contrary to, nor did it involve an unreasonable application of, clearly established federal law as determined by this Court. Relying on a rule first articulated in *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000) cert. denied 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 274 (2000) (the occurrence of clear error constitutes an unreasonable application of clearly established Supreme Court law within the meaning of § 2254), the Ninth Circuit reversed the judgement of the district court, finding the state court clearly erred. *Andrade*, 270 F.3d at 747, 766-67.

AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, ___U.S.___, 2002 WL 1050365, citing *Williams v. Taylor*, 529 U.S. 362, 403-404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). To those ends, 28 U.S.C. § 2254(d)(1) provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. *Bell v. Cone*, ___U.S.___, 2002 WL 1050365.

"Federal law as determined by this Court" refers to "the holdings, as opposed to the dicta of [the Court's] decisions as of the time of the relevant state court decision." *Williams*, 529 U.S. at 412. The federal court independently determines whether a rule is "clearly established" for this purpose. *Id.* at 382. To make this determination, the federal court employs the same analysis used to determine whether a rule is "old" under the doctrine of *Teague*, 389 U.S. 288, except that the court looks only to this court's jurisprudence. *Id.* at 380-84, 412, 416. For § 2254(d)(1) purposes, a rule is "clearly established" if it is "'dictated by precedent at the time the defendant's conviction became final.'" *Williams*, 529 U.S. at 381, *quoting Teague*, 389 U.S. at 301. A rule is not dictated by precedent if a survey of the existing legal landscape shows reasonable jurists may differ about the outcome. *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990); *see also, Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 108 L. Ed. 2d 307 (1990) [stating *Teague* test as whether a rule is "susceptible to debate among reasonable minds"].

The focus of an "unreasonable application" inquiry "is on whether the state court's application of clearly established federal law is objectively unreasonable." *Bell v. Cone*, ___U.S.___, 2002 WL 1050365, citing *Williams*, 529 U.S. at 403-404. As this Court stressed in *Williams*, "an unreasonable application is different from an incorrect one." *Id.*, citing *Williams*, 529 U.S. at 409- 410, 411.

Contrary to the determination below, the California Court of Appeal's adjudication did not involve an unreasonable application of clearly established federal law as determined by this Court, for three reasons. First, in *Van Tran*, 212 F.3d 1143,

the Ninth Circuit held the occurrence of clear error constitutes an unreasonable application of clearly established Supreme Court law within the meaning of § 2254. *Id.*, at 1153-54. But clear error is not an appropriate standard for determining the reasonableness of a state court's merits determination within the meaning of 28 U.S.C. § 2254(d)(1).

Although the term "unreasonable" is difficult to define,[5/] in light of the fact that Congress specifically used that word and not a word such as "erroneous" or "incorrect", an unreasonable application of federal law is different from an incorrect application of federal law. *Williams,* 529 U.S. at 410-11. Therefore, a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court decision applied clearly established federal law erroneously or incorrectly; for a grant of habeas corpus relief the state court decision must also be objectively unreasonable. *Williams*, 529 U. S., at 409, 411.

Clear error, in the context of federal habeas review, is simply a euphemism for a court's independent judgment that it is certain an error has occurred. *See, Van Tran*, 212 F.3d at 1153 (clear error means a definite and firm conviction that an error has been committed). In addition, it fails to address the reasonableness of a state court determination. S*ee, Bell v. Jarvis*, 236 F.3d 149, 161-162 (4th Cir. 2000), *cert. denied sub. nom Bell v. Beck*, ___ U.S. ___, 122 S. Ct. 74, 151 L. Ed. 2d 39 (2001), citing *Francis v. Stone*, 221 F.3d 100, 110 (2d Cir. 2000) (the *Van Tran* standard focuses on how sure the federal court is that the state court erred, rather than on whether the state court decision revealed an "increment of wrongness beyond error"). Accordingly, use of a clear error standard for reviewing state court determinations conflicts with the

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5. In a literal sense, "unreasonable" means not guided by reason, irrational, or capricious. Black's Law Dictionary (7th Ed. 1999), p. 1537.

principles this Court set forth in *Williams* and *Bell v. Cone*.

Equating clear error with unreasonableness also conflicts with this Court's explanation, in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), of the distinction between clear error and unreasonable. There, this Court said a finding is clearly erroneous when, although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed, whereas a showing of unreasonableness would require even greater certainty of error. *Id.*, at 622.

More importantly, application of a clear error standard thwarts Congress' purpose in enacting habeas corpus reform in the first place. According to the Senate sponsor of AEDPA, § 2254(d)'s requirements are the "single most important provision contained in the habeas reform proposal" (141 Cong. Rec. 15,062, col 2 (1995)) (statement of Sen. Hatch), and "[s]tate courts, in many respects, are just as good, if not better, than the Federal courts in these areas, just as good." (Statement of Sen. Hatch). In other words, deference is the essence of AEDPA. And applying a "clear error" standard, which inherently fails to incorporate a consideration of whether there is a degree of wrongness beyond error, fundamentally precludes deference to the state court determination. In fact, application of *Van Tran's* clear error standard comes close to a judicial repeal of the statute. The degree to which a federal court is convinced on the merits is the exact standard this Court rejected in *Williams* because it would have given the 1996 amendment no effect whatsoever. *Williams*, 529 U.S. at 403.

A more appropriate standard for determining reasonableness can be found by analogy to *Teague*. Although *Williams* rejected an "all reasonable jurists" standard, it was not a wholesale rejection of *Teague*. *See, Williams*, 529 U.S. at 410. As previously discussed, under *Teague*, the standard is whether the question is susceptible to debate among reasonable

minds. That standard is clearly distinguishable from an "all reasonable jurists" standard, and easily translates to the reasonableness inquiry required by AEDPA. In fact, this Court has essentially said that *Teague* is a test of objective reasonableness. *O'Dell v. Netherland*, 521 U.S. 151, 156, 117 S. Ct. 1969, 138 L. Ed. 2d 351(1997).

Second, relying in part on the state court's reasoning, the court below held the state court's disregard of *Solem* yielded an unreasonable conclusion. *Andrade*, 270 F.3d at 766. But the intricacies of the state court's reasoning need not concern a federal habeas court. What matters is whether the decision was contrary to controlling federal law. *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002), citing *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (a habeas court is determining the reasonableness of a state court's decision, not grading the state court's papers); *see, Neal v. Puckett*, 286 F.3d 230, 244-46 (5th Cir. en banc, 2001) (§ 2254(d) authorizes a federal habeas court to review only a state court's decision, and not the opinion explaining that decision). Moreover, nothing in the phrase "adjudicated on the merits" requires a state court to either explain its reasoning process or risk being held to have unreasonably applied precedent. *See, Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001).

In fact, addressing the intricacies of the state court's reasoning has led to a hyper-technical application of § 2254(d), resulting, in some cases, to virtually no deference to the state court determination whatsoever. For example, in *Visciotti v. Woodford*, 283 F.3d 1097 (9th Cir. 2002), the court held that in evaluating the prejudice prong of an ineffective assistance of counsel at the penalty phase claim, the California Supreme Court's use of the word "probable," rather than "reasonable probability," rendered the state court determination "contrary to" Supreme Court law. *Id.* at 1108-09. But when viewed in context, the state court's use of the term "probable" appears to have been just a shorthand version of "reasonable probability." *See, In re Visciotti*, 14 Cal.4th 325, 330, 355-56, 58 Cal.Rptr.2d

801(1997). Similarly, in *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), the court held the mere "addition, deletion, or alteration of a factor in a test established by the Supreme Court" constitutes "a failure to apply controlling Supreme Court law under the "contrary to" clause of AEDPA." *Id.* at 1051, fn. 5, citing *Williams*, 529 U.S. at 405-06, and *Brown v. Mayle*, 283 F.3d 1019, at 1039 (9th Cir.2002)).

Further, conditioning reasonableness on the quality of the state court's reasoning, rather than the result, conflicts with the principles this Court established when it held state courts are presumed to follow the law even when they fail to so indicate, *Walton v. Arizona*, 497 U.S. 639, 653 (1990), and federal habeas courts should not require state courts to use particular language in every case in which a state prisoner raises a federal claim. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Moreover, it places federal courts in precisely the sort of tutelary relation to state courts that AEDPA was designed to end. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997).

Third, contrary to the holding below, a survey of this Court's Eighth Amendment proportionality jurisprudence reveals the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life in prison was not **clearly established** at the time of the State court's determination. In *Rummel*, this Court held a life sentence constitutional for a non-violent recidivist whose triggering offense was de minimus. Similarly, in *Hutto*, this Court essentially endorsed a 40-year sentence for possession of nine ounces of marijuana. On the other hand, *Solem* invalidated a life sentence for a non-violent recidivist whose triggering offense was de minimus, but in the process expressly distinguished the case from *Rummel* on the basis that *Rummel* involved a term of years whereas *Solem* involved life without parole. Moreover, *Solem* did not overrule *Rummel*, and said it was controlling in similar circumstances. *Solem*, 463 U.S. at 303, fn. 32. Further, in *Harmelin*, this Court held life without parole constitutional for a first time offender convicted of a

single offense of possession of 650 grams of cocaine. Thus, while it is true that in light of *Harmelin* it appears this Court has found proportionality a factor in capital cases and in non-capital cases involving a "life without the possibility of parole" sentence, it is anything but clear whether proportionality is a factor in cases involving terms of years sentences. This is particularly true in that *Rummel* supports an opposite conclusion. Support for this assertion is also found in Circuit Judge Sneed's concurring in part and dissenting in part opinion in the instant matter, which aptly noted that, "in the wake of *Harmelin*, not a single court has struck down the sentence of an habitual offender on Eighth Amendment grounds." *Andrade*, 270 F.3d at 770.

In other words, there is obvious uncertainty concerning the precise method of proportionality review in non-capital cases. In fact, in *Harmelin,* this Court expressly acknowledged as much. There, Justice Scalia said *Solem* " was scarcely the expression of clear and well-accepted constitutional law," *Harmelin*, 501 U.S. at 965. And Justice Kennedy said that, although they could be reconciled, this Court's "proportionality decisions have not been clear or consistent in all respects" and that, although this Court's decisions have recognized a proportionality principle, its "precise contours are unclear." *Harmelin*, 501 U.S. at 996-998. This lack of clarity was also recognized in *United States v. Kratas*, 45 F.3d 63 (4th Cir. 1995), where the court said it is unclear in light of *Harmelin* whether *Solem's* three-part proportionality test is still relevant in non-capital cases. *Id.*, at 67.

Consequently, the California Court of Appeal did not unreasonably apply this Court's precedent. The state court acknowledged *Harmelin*, concluded it rendered *Solem's* continued vitality questionable, and applied *Rummel*, the case most similar to the facts of this case. Given the striking similarities between Andrade's case and the defendant in *Rummel*, it is not unreasonable for the state court to have concluded that *Rummel* controlled, and therefore two 25-years-

to-life sentences for a chronic recidivist did not constitute cruel and unusual punishment. Accordingly, the state court's merits determination must be upheld. 28 U.S.C. § 2254(d).

III.

FEDERAL HABEAS COURTS SHOULD NOT DECIDE WHETHER A STATE COURT DETERMINATION WAS ERRONEOUS BEFORE TURNING TO THE QUESTION OF WHETHER THE STATE COURT DETERMINATION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, THE UNITED STATES SUPREME COURT'S CLEAR PRECEDENT

In *Van Tran*, the Ninth Circuit held that, when analyzing a habeas corpus claim utilizing the standard of review prescribed at § 2254(d)(1), before deciding whether the state court determination was contrary to, or an unreasonable application of clearly, established federal law as determined by this Court, a federal court must first consider whether the state court's determination was erroneous. *Id.*, at 1154-55. According to *Van Tran*, such a methodology promotes clarity in the Ninth Circuit's own constitutional jurisprudence and provides guidance to the state courts which can look to the federal courts' decisions for their persuasive value. *Van Tran*, 212 F.3d at 1155. In support of its reasoning, the *Van Tran* Court cited, inter alia, *Weeks*, 528 U.S. at 235-37, where this Court rendered an independent decision on the merits of a petition based on this Court's precedents and then determined whether the AEDPA provisions barred relief.

In *Bell*, 236 F.3d 149, the Fourth Circuit rejected the *Van Tran* methodology. *Bell* explained that the *Van Tran* requirement seems to be predicated on a decision to equate an "unreasonable" state court decision within the meaning of § 2254(d)(1) purposes with one that is "clearly erroneous." *Bell*, 236 F.3d at 162, fn. 9. Citing this Court's *Williams* decision,

Bell held that "unreasonable" and "clearly erroneous" could not be equated. *Id.* at 162. *Bell* further noted that, in *Francis*, 221 F.3d at 110, the Second Circuit concluded the *Van Tran* requirement focuses on how sure the federal court is that the state court erred, rather than on whether the state court decision revealed an "increment of wrongness beyond error." *Bell*, 236 F.3d at 162. *Bell* thus rejected the idea that a federal court's independent opinion on the merits of any constitutional claims could have any determinative effect on a case, or any precedential value for state courts, finding such an independent opinion would constitute, at best, a body of constitutional dicta. *Id.* at 162.

Concerning *Van Tran*'s suggestion that the methodology it adopted would provide guidance to the state courts, *Bell* observed there were no persuasive reasons for federal habeas courts to offer opinions on constitutional questions in order to provide guidance to the state courts, nor was there any reason to presume state courts needed the guidance. *Bell*, 236 F. 3d. at 162. Finally, *Bell* rejected *Van Tran's* reliance on *Weeks*, concluding it could find no implied requirement that lower federal courts are to render an independent decision on the merits of a claim and noting that *Weeks* did not require such a methodology. *Id.* at 161, fn. 8.

The criticisms of the *Van Tran* methodology expressed in *Bell* and *Stone* are well-taken. A determination as to whether error occurred serves no purpose. As previously discussed, a federal habeas court's determination that the state court erred is essentially irrelevant to an analysis of whether the state court determination was reasonable or not. Moreover, the *Van Tran* methodology seems to conflict with this Court's more recent decision in *Penry v. Johnson*, 532 U.S. 782, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001), where this Court first determined whether the state court determination was contrary to, or an unreasonable application of, this Court's established precedent. Concluding the state court's determination did not violate either prong of the statutory standard of review, this Court held the

defendant was not entitled to any relief. *Penry*, 121 S. Ct. at 1919. In so doing, this Court at least impliedly rejected the *Van Tran* methodology.

CONCLUSION

This Court should end the confusion surrounding its Eighth Amendment jurisprudence in non-capital cases. In the final analysis, the question before this Court is what will the Constitution tolerate regarding term of years sentences. The answer ought to be that "exceedingly rare examples" of unconstitutional sentences are those sentences that are not susceptible to debate among reasonable minds. Any other test is unworkable and antithetical to concepts of federalism.

This Court should clarify that federal habeas review of state court merits determinations is limited to the decision of the state court, and does not extend to the state court's reasoning.

This Court should also clarify what "unreasonable" means within the context of § 2254(d). Although what is "reasonable" inherently involves the particular circumstances of a case, the test ought to be that a state court determination is reasonable if the result is susceptible to debate among reasonable minds. Such a test provides the best method of evaluating the results of a state court determination.

Accordingly, Petitioner-Appellant respectfully requests the judgment of the Court of Appeals for the Ninth Circuit be reversed.

Dated: June 11, 2002

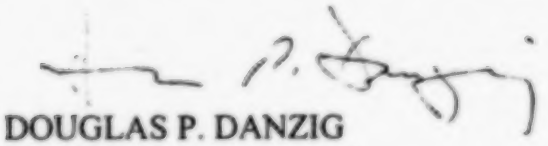
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